IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CIVIL APPLICATION NO. 2095 OF 2002

IN

FIRST APPEAL NO. 258 OF 1985

SMT. JAITUNBI Wd/o ABDUL MAJID JAHUR.. PETITIONER

Vs.

SALIMABAI MOHAMMED BASHIR & ORS. .. RESPONDENTS

Mr. Vakil with Anilkumar Shah for petitioner

Mr. G.T. Mestha, Commissioner for Taking Accounts, High Court, Bombay.

Mr. A.D. Patankar, S.O., Commissioner's office.

Mr. S.N. Kadam, IInd Asstt. To Court Receiver, High Court, Bombay

CORAM:-SMT. RANJANA DESAI, J.

DATED:-4 & 6-5-2005

P.C.

This civil application is filed by the appellant in First Appeal No.

258 of 1985 inter alia praying that the order dated 25/28th March, 1988 passed by Justice Sharad Manohar in First Appeal No. 258 of 1985 be ordered to be complied with. For convenience the petitioner is referred to as the appellant.

2. First Appeal No. 258 of 1985 arises out of an administration suit filed by the appellant Jaitunbi wd/o Abdul Majid Jahur. In that suit the City Civil Court at Bombay held that Jaitunbi has 1/12th share in the suit property. However, the suit was dismissed on the ground that it was barred by limitation. The appellant preferred the instant appeal. The appeal was allowed. Operative part of order of Justice Sharad Manohar assumes importance and hence it may be quoted:

> "11. The Appeal succeeds. The decree of dismissal passed by the lower Court is set aside and it is ordered that the plaintiff is entitled to accounts for a period of three years before the date of the suit onwards till the date of getting of possession of her share in the suit property. The trial Court shall appoint Commissioner for Taking Accounts as well as for effective partition by metes and bounds on an equitable basis. After receiving the report from the Commissioner as

regards the accounts and as regards the division of property, possession is to be given to the share of the plaintiff on the basis that she has 1/24th share in the suit property. The trial court will pass a final decree in that behalf in the administration suit. The trial court shall see to it that everything needful in this behalf is done by the Commissioner within three months from the date when the matter is referred to the Commissioner. The trial Court is directed to make the requisite reference to the Commissioner forthwith. Likewise, the office of this Court is directed to prepare the preliminary decree in this judgment without any loss of time and to send the matter to the lower Court within one month from the date of signing of this order. The question of appointment of Receiver should be dealt with by the trial Court itself before or at the time of the passing of the final decree."

3. In the civil application it is inter alia stated that opponent 2(g) Altaf has been threatening the appellant. He poses to be owner of the entire property. He has transferred number of rooms and received

consideration. In short the appellant is being denied her share. It is also prayed that the Court Receiver be changed. Aspertions are cast on the Court Receiver's office.

4. Mr. Vakil, the learned counsel appearing for the appellant contended that the High Court disposed of the appeal as far back as on 25/28/3/88. However, till date the appellant has not got the fruits of the decree. He contended that the appellant is an old widow. She is finding it hard to make two ends meet. It is time she gets what is her due under the High Court's order dated 25/28/3/88. Normally in a disposed of First Appeal such a civil application may not be entertained. For implementation of the order parties will have to approach the court to which directions are given by this court. However, since Mr. Vakil made serious allegations against the Court Receiver and the Commissioner for Taking Accounts, I had directed them to submit their reports. Accordingly they have submitted their reports. Copies thereof have been served on the appellant's counsel. In view of serious allegations of malpractice, inaction and lethargy, it is necessary to refer to the contents of the reports.

5. Pursuant to the direction of this court the City Civil Court by its order dated 16/1/92, appointed the Court Receiver, High Court, Bombay as the Receiver in respect of the suit property. The Receiver took

symbolic possession of the suit property and as per the direction of the City Civil Court, he deputed his representative to the suit property to prepare list of tenants and collect particulars of rent paid by them. The Receiver submitted his report dated 4/3/92 to the Court. The report was accompanied by the list of tenants found at the suit property and particulars of rent paid by them.

6. By order dated 17/6/98 the Receiver was inter alia directed to take action against the occupants who failed to pay the amount despite written notice. He was also directed to pay to the Commissioner for Taking Accounts the amount required to be paid for the cost, charges and expenses of public auction. Accordingly the Receiver deposited a sum of Rs.10,000/- by cheque with the Commissioner's office.

7. It appears from the report that on several dates on which meeting was fixed by the Receiver the parties did not remain present. The Receiver's Rent Collector has collected rent. On 4/7/02 the Receiver's representative visited the suit property and submitted his report to the court on 18/7/02. Permission was granted to the appellant to carry out repairs to her room. Show cause notice dated 9/8/02 was issued to the occupants of Room Nos. 17 & 18. Upon receipt of letter dated 14/8/02 from the plaintiff's advocate making grievance about the occupant of

Room No. 4, the Receiver fixed an appointment to verify the contents of the said letter. However, the parties did not remain present. Again a meeting was fixed on 7/6/02, but the parties did not remain present on that day either.

8. The report further states that the Receiver received letter dated 21/8/02 from the Rent Collector that the occupant of Room No. 4 of Chawl No. 33 had sublet the room. The Receiver issued show cause notice dated 11/12/02 to the occupant. However, there was no response from the said occupant.

9. It is stated in the report that as of today a sum of Rs.54,416/- is lying in suit account. As regards the grievance that the Receiver is not taking any action against the tenants who have sublet the premises, it is stated that previously in such cases the Receiver used to file appropriate proceedings by engaging advocates from the panel of the Receiver and professional fees of the said advocates used to be paid from the suit account. However, since last five to six years, the advocates who are on the panel are not willing to accept work in view of the meagre professional fees offered by the Receiver. Hence now the Receiver is directing the parties to engage their own advocates.

10. Pursuant to the City Civil Court's order directing the

Commissioner for Taking Accounts to effect partition by metes and bounds the Commissioner took certain steps. It appears that M/s. Techno Services Pvt. Ltd., a Valuer was engaged to survey the property and submit its report. In this connection it is absolutely necessary to refer to the report of the Commissioner for Taking Accounts dated 12/11/1993. This report makes reference to the report of M/s. Techno Services Pvt. Ltd. and states as under:

> "M/s. Techno Services surveyed the property and gave their Valuation Report in writing dated October 1993. The copies of the said report (excluding valuation) were furnished to all the parties either in person or through their Advocates. All of them have gone through the same and agreed with the opinion expressed by the Valuer that there cannot be feasible division of the suit property on equitable basis. The property is fully tenanted. The nominal tenancy rent collected from each tenant. According to the survey the property in question is under occupancy of residing tenants who are covered under the Bombay Rent Act. Hence the property on the whole cannot be sold out on ownership basis

and hence the property could be assessed only by "Rent Method".

Partition based on land area could not be worked out to ascertain the feasibility and possibility of partition of the property between the parties to the suit.

The partition based on numbers of tenants i.e. to say 6.63 tenants per party to the suit becomes non vaible. Thus feasibility and possibility of the partition of the property between the parties to the suit cannot be worked out.

The partition based on rent collected i.e. to say Rs.109.22 per party or thereabout p.m., and all the legal, municipal and government titles should be covered on his/her name and further dealing in that particular property should be handled by that party which could not be feasible or possible.

Thus from the Valuation Report it is very clear that there is no feasibility or possibility of division of the suit property on equitable basis.

11. After the Commissioner submitted this report the City Civil Court directed the Commissioner to sell the property by public auction by private

treaty. The Commissioner made efforts in that direction but because the property is fully tenanted and there are disputes between the parties none came forward to buy the property. The Commissioner, therefore, submitted her report dated 3/2/96, setting out the best and reasonable way to divide all the 3 chawls in the following way:-

> Chawl No. 33 which stands in the name of the plaintiff and which has got 8 rooms, that chawl goes to the plaintiff.
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> Chawl Nos. 33-B and 33-C have got 25 rooms out of which 15 rooms goes to Defendant No. 10 and remaining 10 rooms will go to Defendant Nos. 5,6,7 and 8 together having their share 11/24th.
>
> Defendant Nos.2(a) to 2(g) and 3 gets total 18 rooms in Chawl No. 10 as 1/3rd share and Remaining 4 rooms in Chawl No.10 will go to Defendant No.9.

12. This report was not accepted by the City Civil Court. By order dated 14/10/97, the City Civil Court directed the Commissioner to put the

property for public auction and spend money from the amount collected by the Receiver from the tenants by way of rent. The Receiver was directed to pay the requisite amount to the Commissioner. The Receiver accordingly sent Rs.10,000/- by cheques to the Commissioner.

13. Further course of events is stated by the Commissioner in his report dated 31/3/05. The Commissioner has stated that the orders dated 14/10/97 and 9/3/98 directing the Commissioner to sell the suit property by public auction and pay the publication charges etc. was communicated to his office vide letter dated 3/4/98. As per request made by his office, the Receiver sent the amount of Rs.10,000/- to his office. On 21/4/98, the appellant's advocate informed the Commissioner that they would get the court's order modified. On 13/8/98, the appellant's advocate submitted that he will lodge draft of particulars and conditions of sale, proclamation of sale and advertisement in the Commissioner's office. However, no steps were taken by him. On 10/9/98, the appellant's advocatge was again directed to lodge the required documents. On 4/11/98, the appellant's advocate was directed to obtain extension of time as it had expired on 9/10/98.

14. According to the Commissioner the matter was time and again adjourned on the application of the appellant's advocate for complying

with the directions. It is further stated in the report that on 9/7/99, the appellant's advocate tendered the required draft. Defendant 2(g) raised objection to it. He was directed to file objections. Thereafter the appellant's advocate asked for adjournment.

15. The report further goes on to say that on 31/8/99, the appellant's advocate made a statement that the appellant is not having title deeds. On 15/10/99 the appellant's counsel sought adjournment as he wanted to move the court for obtaining appropriate orders as neither of the parties were in possession of title deeds of the property and they were only in occupation of the structures thereon. He further informed that the land belongs to Wadia Trust. On 1/12/99, the defendant's advocate also asked for time as the defendant did not have title deeds and they wanted to get the High Court”s order modified.

16. It is further stated in the report that on 27/7/2000, the appellant's advocate stated that they had taken out notice of motion for modification of court's order dated 14/10/97, which was made returnable on 18/8/2000. The Commissioner submitted his report dated 28/8/2000 to the court on 31/8/2000. Thereafter till 8/8/01 parties went on taking adjournments. On 15/2/2002, the appellant's advocate informed that civil application was filed by the appellant and hence longer time may be given. On 27/3/02

the Commissioner informed the parties that the matter is finally adjourned to 10/4/02, and on their failure to comply with the earlier directions the matter will be removed from the file for non-compliance under Rule 266 of the Bombay City Civil & Sessions Courts Rules 1948 ("the BCCCT Rules" for short). On 10/4/02 the appellant's advocate informed the Commissioner that he has filed a civil application and that he wants to get the order dated 28/6/01 passed by Judge Shri Dholakia modified. Finally the appellant was directed to comply with the earlier directions on or before 19/10/02 and told that otherwise the matter will be removed from the file under Rule 266 of BCCCT Rules. Parties have still not complied with the directions.

17. I must now refer to the affidavit in reply filed by the appellant in which very serious allegations are made. It is stated that after the civil application was adjourned by me taking advantage of the adjournment the Receiver malafide procured a report from the Commissioner suo motu trying to put false blame on the appellant. This allegation is devoid of substance. I must make it clear that the Commissioner was directed by me to submit his report.

18. From the reports submitted by the Commissioner it is clear that the suit property is fully tenanted. Both the appellants and the defendants

have stated that they do not have title deeds. It appears that the property belongs to the Wadia Trust. Several adjournments were taken to produce title deeds but the parties did not produce them. Mr. Vakil at one stage stated that private Receiver may be appointed. However, after sometime he withdrew his statement.

19. From the Receiver's report and the Commissioner's report it is clear that on several occasions parties have not remained present. They have not complied with the directions. Statements were made that the court's order would be got modified but no steps were taken. In such circumstances it is highly improper to put the entire blame on the Receiver and the Commissioner. In the affidavit in reply there is no proper explanation about the inaction of the appellant.

20. It is true that in cases of illegal subletting the Receiver must take immediate legal steps against those who indulge in such activities. But the Receiver's explanation also needs to be given due consideration. In the suit account only Rs.57,416/- are lying. According to the Receiver the panel advocates are not accepting work because of the meagre fees paid by the Receiver. In such circumstances the parties are directed to engage advocates. Difficulties faced by the Receiver's office may be genuine. But the Receiver will have to find out solution for these problems so that

he can effectively perform his duties.

21. Today defendant No. 2(g) Altaf Husain is present in the Court. It appears that the parties have worked out some arrangement. Altaf Hussain states that he is willing to give possession of rooms No. 3 and 4 to Jaitunbi, who is also present in the court. Room No. 6 is already in her possession. Accordingly he may handover the possession of rooms No. 3 & 4 to Jaitunbi. Till such time as the Court passes final orders in this matter this interim arrangement worked out by parties may operate. Jaitunbi may remain in possession of the said rooms. She may recover the rent but she will have to bear all the outgoings. This arrangement may give some relief to Jaitunbi, who is denied the benefit of the decree for the last about seventeen years.

22. I direct the Court Receiver to give her 1/24th share of the rent amount collected by Court Receiver sofar and which is lying with the Court Receiver. I am told that it comes to about Rs.2500/-. That amount may be paid to her in cash. Jaitunbi's advocate will have to identify Jaitunbi.

23. The Court Receiver will visit the suit premises on 16th of May, 2005. Defendant No. 2(g) Altaf Husain should remain present at 11 O'clock in the morning. Jaitunbi shall also remain present. The

possession of the said rooms will be handed over by Altaf Husain to Jaitunbi in the presence of the Court Receciver and the Court Receiver shall record this fact.

24. It is clarified that this arrangement will be subject to final orders, which will be passed by the court. This arrangement worked out by the parties will not decide ownership of the said rooms. Mr. Vakil states that necessary steps will be taken by the appellant to get the court's orders modified.

25. The Commissioner shall return the amount of Rs.10,000/- which are lying with him to the Receiver. If necessary the Receiver can always be directed to send it back. The Receiver will render all help to secure implementation of this court's order.

26. It is noticed that on many occasions the Receiver is not represented by a lawyer. When I enquired as to why even in contested cases the Receiver is not represented by a lawyer, I was informed that the panel of advocates was prepared and guidelines for fixation of their professional fees were given in an office order which was to come into effect from 1/4/93. The advocate's panel has now become defunct. Some of the advocates are either not contactable or are not available. Absence of able lawyers creates difficulties in proceedings which are initiated by

the Receiver or in proceedings which are adopted against him. Advocates are reluctant to accept briefs on behalf of the Receiver because compared to the recent standard of fees the fees offered by the Receiver are very low. If this is so, I feel it is necessary to prepare a fresh panel and revise the fees and fix fresh guidelines. The Receiver's report dated 19/4/05 requires serious consideration. The Receiver should take appropriate steps to replace its defunct panel by a proper panel.

27. Civil application is disposed of.

28. Parties to act on authenticated copy of this order.

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